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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Petition for Declaratory Ruling )  
That the Basic Universal Service )  
Offering Provided by Western Wireless )  
in Kansas Is Subject to Regulation as )  
Local Exchange Service )

Docket No. WT-00-239  
DA-00-2622

**Reply Comments of Townes Telecommunications, Inc.**

Townes Telecommunications, Inc. ("Townes") submits these reply comments to support the above-referenced petition filed by the State Independent Alliance ("SIA") and the Independent Telecommunications Group ("ICG") ("Joint Petition"). The Joint Petition requests that the Commission issue a declaratory ruling that the Basic Universal Service ("BUS") offered by Western Wireless Corp. ("Western Wireless") in Kansas should be subject to the state regulations and universal service requirements that are applicable to all Eligible Telecommunications Carriers ("ETCs"), and that Section 332(c) of the Communications Act of 1934 ("Communications Act") does not prevent or preclude state regulation of the BUS offerings.

**I. Statement of Interest**

Townes is a corporate holding company that owns incumbent local exchange carriers ("ILECs") throughout the United States, including Kansas and other states where Western Wireless intends to provide BUS, employing a wireless local loop. Western Wireless made clear that it intends to directly compete with wireline carriers such as Townes' affiliates by configuring and promoting its BUS offerings as an alternative to

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traditional local telephone service. As ILECs subject to both state and federal regulation, including state universal service requirements, Townes' affiliates will be at a substantial disadvantage if forced to face wireless competitors such as Western Wireless, which receive Universal Service funding while being granted immunity from the state regulatory burdens and service obligations to which wireline ETCs are subject.

## **II. Western Wireless's BUS Offering Should Be Regulated as Local Exchange Service**

Townes believes that all ETCs should be subject to a similar set of entry and rate regulations, service standards and universal service requirements, regardless of what technology is used to provide their local loop. Townes agrees with the majority of the parties that filed initial comments in this proceeding that Western Wireless' BUS should be regulated as local exchange service, and urges the Commission to clarify that states may regulate the wireless local loop under Section 332(c)(3) of the Communications Act, thereby establishing a level playing field between technologies.<sup>1</sup>

The Joint Petition correctly points out Western Wireless' cynical efforts to obtain ETC status and compete head-to-head with traditional wireline carriers, simultaneously promoting its BUS as interchangeable with wireline offerings but claiming that BUS cannot be regulated as a "local" service because it is really "mobile" CMRS. It is clear

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<sup>1</sup> Accord, Comments of John Staurulakis, Inc. ("JSI") at 2-4; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 2-4; Comments of the South Dakota Independent Telephone Coalition, Inc. ("SDITC") at 2-5; Comments of the National Telephone Cooperative Association ("NTCA") at 1-5; Comments of the Minnesota Independent Coalition ("MIC") at 3-6; Comments of the Rural Iowa Independent Telephone Association ("RIITA") at 1-5; Comments of the Nebraska Rural Independent Companies ("NRIC") at 1-4.

that the wireless local loop services for which Western Wireless seeks ETC status in Kansas and other states are intended as a substitute for wireline services. As the Joint Petitioners point out, the BUS offering differs from Western Wireless' CMRS in that it is priced and structured entirely differently, and mimics wireline characteristics such as a dialtone and a traditional telephone handset, so customers will find BUS similar to wireline local service.<sup>2</sup> Western Wireless offers a different pricing structure for its BUS offering, and apparently does not offer BUS in conjunction with CMRS.<sup>3</sup> Moreover, as SDITC demonstrates from Western Wireless' ETC application in South Dakota, BUS may, in some cases, use resold wireline services in order to fill gaps in the company's wireless coverage.<sup>4</sup>

It is apparent in this respect that the attempts of Western Wireless and other wireless interests to portray BUS as a "mobile" service pushes this term beyond the breaking point. The Commission's definitions establish that a "mobile service" involves "mobile stations," which are "radio-communications station[s] capable of being moved and which ordinarily does move."<sup>5</sup> Despite the efforts of Western Wireless, Sprint PCS, Dobson Cellular Systems, Inc. ("Dobson") and the Rural Telecommunications Group to inaccurately portray the comparative immobility of the "Fixed Wireless Terminals" used

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<sup>2</sup> See Joint Petition at 6-10, 11-12; see also MIC Comments at 5 and JSI Comments at 5-6.

<sup>3</sup> See Joint Petition at 6, 12.

<sup>4</sup> See SDITC Comments at 4, citing Direct Testimony of Christopher R. Johnson at p. 8 (describing how Western Wireless' infrastructure will support all of the services necessary to qualify it as an ETC in South Dakota).

<sup>5</sup> See 47 C.F.R. Section 3(27)(defining "mobile service") and 47 C.F.R. Section 3(28)(defining "mobile stations").

to provide BUS as mobile, the fact remains that the terminals are not intended to be portable, in their ordinary use,<sup>6</sup> and only function within a limited “home service area.”<sup>7</sup> The Fixed Wireless Terminals are in fact highly distinct from ordinary CMRS equipment, and are manufactured for Western Wireless with the explicit – and limited – functionality of providing fixed wireless services.<sup>8</sup> Indeed, if one extends the characterizations of Western Wireless and certain of its supporters, a municipal fire hydrant could be deemed “portable” since it could ostensibly be unbolted from the water system, picked up, attached to a tank truck, carried to another location, and then be reattached to another pipe within the same municipality.<sup>9</sup>

As a policy matter, Townes also agrees with the comments of the Rural Utilities Service (“RUS”) that allowing BUS to be regulated only as CMRS will create a “split-level playing field” between direct competitors in the market for local services, to the detriment of competition and universal service, and agrees with OPASTCO and JSI that it

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<sup>6</sup> See Joint Petition at 7-11; SDITC Comments at 3-5;

<sup>7</sup> See RUS Comments at 3.

<sup>8</sup> See Joint Petition at 7-11; JSI Comments at 5-6; MIC Comments at 5.

<sup>9</sup> A Fixed Wireless Terminal can only be moved if it is unplugged from its electrical power source, attached to a battery back-up, disconnected from its antenna, reattached to a short portable antenna, and then reattached to a standard telephone. See Joint Petition at 9-10. By Western Wireless’ admissions, such batteries are intended as back ups in case of power outages, and are not truly intended to make the units portable. Id. Accord, JSI Comments at 6. Although Dobson attempts to excuse these facts by comparing the Fixed Wireless Terminals to the cumbersome devices used during the infancy of the consumer wireless market, and argues that the Commission should not make a “value judgement” based upon “the current state of BUS technology,” the fact remains that the underlying purpose of the fixed wireless terminals is clearly fixed service. See Dobson Comments at 4-5.

is essential that the Commission pursue regulatory parity.<sup>10</sup> This is not a matter of “saddling” wireless providers with “new” regulations, as Sprint attempts to characterize the issue in its opposition to the Joint Petition. Rather, the debate is about treating new market entrants equally under existing regulations, and artificially creating competitive imbalances between competing technologies. Preventing the states from regulating local services provided through fixed wireless terminals would create a tremendous competitive disparity in which wireline carriers, subject to traditional state service requirements and regulations, would face essentially unregulated wireless competitors. State regulators also would be placed in the impossible position of being required to maintain universal service in a market where some of the ETCs were beyond regulation.

It should also be clear that allowing fixed wireless terminals to be regulated as “mobile” would not only disadvantage ILECs competing against wireless ETCs, but would also discourage wireline competitive LECs (“CLECs”) from competing against the wireless ETCs, since the CLECs would be subject to the same competitive disadvantage. This would likely stall or stunt the development of facilities-based or resale-based wireline CLECs in any area that might be served by a wireless ETC, and would further skew competition – to the detriment of consumers.

Lastly, beyond issues of competitive neutrality, the Commission must be careful of establishing bad precedent when addressing the regulatory status of BUS, and of hopelessly compromising the boundaries of its service definitions. For example, if the Commission rules that a service such as BUS is a “mobile” service – despite very clear

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<sup>10</sup> See RUS Comments at 2-3; JSI Comments at 2-4; OPASTCO Comments at 3-6.

evidence that it is designed and used as a fixed service – the same logic might be extended to claims that 900 MHz cordless telephones a “mobile” service.

### **III. Neither Federal Law Nor the Commission’s Precedent Prohibit State Regulation of Western Wireless as an ETC**

Not only is regulatory parity between wireline and wireless local services essential as a policy matter, but it is also necessary under both the Communications Act and Commission precedent.

The Commission has previously rejected blanket determinations that all wireless services offered by CMRS providers are “mobile” services subject only to federal regulation.<sup>11</sup> The Commission has also determined that not all services offered by wireless licensees are automatically “mobile,” and that a non-mobile service provided by a licensee is not necessarily entitled to immunity from state regulation.<sup>12</sup> In the interest of competitive neutrality between wireless and wireline ETCs that provide local services, the Commission should now extend these rulings and clarify that fixed wireless services used to provide a local loop may be regulated by the states without preemption.

SDITC correctly points out that Section 332(c)(3) prohibits the application of State or local rate or entry regulation over mobile wireless services and not fixed wireless services.<sup>13</sup> In addition, Section 332(c)(3)(A) of the Communications Act clearly

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<sup>11</sup> See Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Second Report and Order and Order on Reconsideration, WT Docket 96-6, FCC 00-246 (rel. July 20, 2000).

<sup>12</sup> See Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order, 11 FCC Rcd 8965, 8985-87 (1996).

<sup>13</sup> See SDITC Comments at 3.

anticipates that CMRS providers should be subject to State regulation to the extent that CMRS is used as a substitute for wireline exchange services. Under these provisions, it is clear that the Communications Act does not exempt wireless carriers from State regulation when they provide fixed services and become eligible for Universal Service funding as ETCs.

The Commission's Rules concerning the provision of fixed wireless service also support this conclusion. Specifically, while Sections 22.343 and 22.901(d) of the FCC's Rules anticipate mixed mobile and fixed uses of CMRS, Section 22.323 of the Communications Act indicates that any fixed service is considered to be separate and incidental to the provision of "primary public mobile service." Such "incidental" use, such as using a mobile handset in one's home at night, is a far cry from the type of offering by Western Wireless' BUS service, which is about as mobile as a fire hydrant. Indeed, as the Commission has concluded in a separate proceeding, "[f]ixed wireless technologies provide an alternative to the incumbent LECs' offering of basic and advanced services."<sup>14</sup> Against this background, a service simply can not be considered ancillary or "incidental" or "auxiliary" to CMRS where a carrier is providing local exchange services by means of a fixed wireless services (coupled with portions of the wireline local loop), and is receiving universal service support as an ETC. The

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<sup>14</sup> See Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217 and CC Docket Nos.: 96-98, 88-57, FCC 00-366 (rel. Oct. 25, 2000); Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57 FCC 00-366 (Oct. 25, 2000).

Commission should reject the contrary arguments of the Rural Telecommunications Group (“RTG”) on this score.<sup>15</sup>

**IV. The Commission Should  
Resolve the Regulatory Status of Fixed Wireless Services**

Townes agrees with the comments of the MIC that the issues raised in the Joint Petition must be resolved soon, since they have arisen in other states and will likely recur.<sup>16</sup> The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty.<sup>17</sup> It is therefore an evasion to claim that the Commission must wait for a specific state request before acting, as RTG contends. Recent Commission actions unambiguously demonstrate the Commission’s ability to issue such rulings. For example, the Commission addressed actions by the South Dakota Public Utilities Commission on its own motion.<sup>18</sup> Additionally, the Commission recently issued a Declaratory Ruling addressing certain aspects of the Kansas universal service program, even though the Kansas Corporation Commission had requested no guidance and the issue was moot.<sup>19</sup> Although the Kansas Corporation Commission did not file the

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<sup>15</sup> See RTG Comments at 4-7.

<sup>16</sup> See Comments of the Minnesota Independent Coalition at 3.

<sup>17</sup> See 5 U.S.C. Section 554(e) and 47 C.F.R. Section 1.2.

<sup>18</sup> See Federal-State Joint Board on Universal Service: Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, 2000 FCC LEXIS 4204 (Aug. 10, 2000).

<sup>19</sup> See In the Matter of Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to

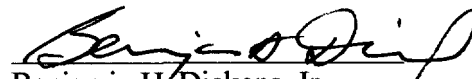


petition in the instant proceeding, it has requested that the Commission resolve the regulatory status of BUS.<sup>20</sup>

V. **Conclusion**

Townes agrees with the Joint Petitioners and the majority of commenters in this proceeding that Western Wireless' BUS offering is clearly a fixed service, and should not be classified as a CMRS service exempt from state regulation over local exchange services and universal service.

Respectfully submitted,



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January 8, 2001

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Section 253 of the Communications Act of 1934, Memorandum Opinion and Order, File No. CWD 98-90, 2000 FCC LEXIS 4529 (2000).

<sup>20</sup> See Comments of the Kansas Corporation Commission at 2-4.

## CERTIFICATE OF SERVICE

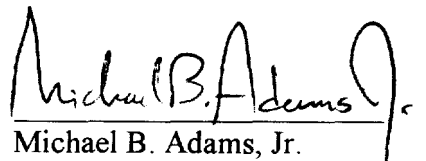
I, Michael B. Adams, Jr., hereby certify that I am an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and that a copy of the “**Reply Comments of Townes Telecommunications, Inc.**” to be served by first class mail or hand delivery this 8<sup>th</sup> day of January, 2001, to the persons listed below.

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